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NO. 82-369

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GULF OFFSHORE COMPANY,
A DIVISION OF THE POOL COMPANY,
Petitioner,

v.

MOBIL OIL CORPORATION, ET AL.,
Respondents.

On Petition For Writ of Certiorari To The Court of Appeals For The Fourteenth Supreme Judicial District of Texas

BRIEF OF RESPONDENT STEVEN GAEDECKE IN OPPOSITION TO PETITION FOR CERTIORARI

JOSEPH D. JAMAIL
3300 One Allen Center
Houston, Texas 77002
(713) 651-3000
Counsel of Record for Respondent Steven Gaedecke

Of Counsel:

JAMAIL, KOLIUS & MITHOFF
GUS KOLIUS
JOHN B. NEIBEL
NAT B. KING
3300 One Allen Center
Houston, Texas 77002
(713) 651-3000

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

I

QUESTIONS PRESENTED FOR REVIEW, IF ANY

Respondent Gaedecke,[1] being dissatisfied with the presentation of petitioner, submits the following:

1. Gulf's petition presents *nothing* for review:

This court failed to decide the applicability of the *Liepelt*[2] nontaxability rule to this case, but remanded that question to the Texas Court of Appeals for determination. That court having done so, and the Texas Supreme Court having refused to review its decision, the matter has been terminally adjudicated.

2. Alternatively:

(a) Does the *Liepelt* rule displace the state (Louisiana) rule (which does not *require* a nontaxability jury instruction in a personal injury suit) in this Outer Continental Shelf Lands Act (OCSLA)[3] case?

(b) In any event, was the failure to give a *Liepelt* instruction in this case harmless error?

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1. The Parties are referred to by abbreviated name "Gulf", "Mobil", "Gaedecke".

2. *Norfolk and Western Railway Company v. Liepelt*, 444 U.S. 490, a Federal Employers Liability Act (FELA), 45 U.S.C. Sec. 51 et seq., wrongful death case.

3. 43 U.S.C. Sec. 1331 et seq. We employ the U.S.C. citations prior to the recodification of OCSLA in 1978, as did this Court in its opinion in Cause No. 80-590. 453 U.S. 473, n.5.

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INTRODUCTION

Respondent Steven Gaedecke ("Gaedecke"), plaintiff in the trial court and a party to the proceeding in the court whose judgment is sought to be reviewed, requests this Court to deny the petition for certiorari filed herein by petitioner Gulf Offshore Company, a Division of the Pool Company ("Gulf").

OPINION BELOW

The opinion of the Texas Court of Appeals on remand from this Court is reported at 628 S.W.2d 171, and reproduced in petitioner's Appendix A-1.

JURISDICTION

Jurisdictional requisites are adequately set forth in the petition, p. 2.

STATUTES INVOLVED

The statutes involved are adequately set forth in the petition, pp. 2-4.

STATEMENT OF THE CASE

The facts material to the questions presented appear in the opinion of the Texas Court of Appeals, petitioner's Appendix A-1.

SUMMARY OF THE ARGUMENT

I.

As This Court Delegated To The Texas Court Of Appeals The Decision As To Whether A *Liepelt* Nontaxability Instruction Is Applicable In This OCSLA Personal Injury Case, The Latter's Decision Is Final.

1. The Court previously granted certiorari in this case to specifically consider whether a jury instruction that personal injury damages are not taxable is appropriate in an OCSLA case. 453 U.S. at 477. All parties briefed and argued that point.

2. Instead of deciding the matter, this Court remanded the case to the Texas Court of Appeals for determination because of the Court's dubitante as to the applicability of *Liepelt* to the case at bar. By not deciding the question itself, it must be assumed that the decision of the Court of Appeals was anticipated and is now *final.*

II.

As *Liepelt*, A FELA Wrongful Death Case, Is Not "Applicable" To This OCSLA Personal Injury Case It Does Not Displace Louisiana Law.

1. As the federal common law enunciated in *Liepelt* is not "applicable" to OCSLA, state law remedies adopted as federal surrogate law cannot be "inconsistent" therewith.

2. OCSLA provides no federal remedy or cause of action for personal injuries suffered on the shelf. This "gap" is filled by state law adopted as federal surrogate law. Congress rejected uniformity and borrowed a Louisiana remedy which does not make a nontaxability instruction mandatory; thus *Liepelt* does not displace adopted state law.

3. Congress did not intend that the "gaps" in federal law in this case be filled with new federal common law. On the contrary it was to be filled by *state law adopted as federal surrogate law.*

4. The courts have uniformly restricted *Liepelt* to FELA cases.

III.

In Any Event, Failure To Give A *Liepelt* Instruction Was Harmless Error.

1. Error is not presumed, thus Gulf has the burden of showing that prejudice resulted from the failure to give a *Liepelt* instruction under the *uncontested* facts of the case at bar.

2. Gulf was not prejudiced because:

(a) The evidence fully supports the jury's verdict and does not indicate it was operating under any misconceived notion of the tax laws;

(b) It does not contend that the verdict is not supported by the evidence.

ARGUMENT

I.

BY REMANDING TO THE TEXAS APPEALS COURT WITHOUT DECISION THE QUESTION OF WHETHER THE STATE RULE AS TO TAXABILITY OF PERSONAL INJURY AWARDS IS DISPLACED BY *LIEPELT* IN AN OCSLA CASE, THIS COURT AUTHORIZED THE TEXAS COURT TO MAKE A FINAL DETERMINATION OF THE MATTER.

The reason this Court remanded this case to the Texas Court of Appeals was its doubt that *Liepelt* controls an OCSLA case because: (1) Congress in that Act "borrowed a remedy provided by state law and thereby 'specifically rejected national uniformity' as a paramount

goal",[4] and (2) Congress in providing for filling the "gaps" in federal law "did not intend that federal courts fill those 'gaps' themselves by creating new federal law". 453 U.S. at 487-488. The Texas Court of Appeals said (628 S.W.2d at 174):

> If the Supreme Court had not intended this very decision [*Liepelt* is *not* "applicable"] it would not have expressed doubt about the application of the *Liepelt* rule and would have decided the question itself and not remanded to this Court for determination.

This conclusion by the Texas Court of Appeals is obviously "just under the circumstances". 28 U.S.C. Sec. 2106.[5]

On remand the Texas court was free to determine the federal questions not determined by this Court. *Wilson v. Cook*, 327 U.S. 474, 489 (1946). It was not "imprisoned within an adjudication to be attributed to this Court which this Court never made". *Ex Parte State of Texas*, 315 U.S. 8 (1942). Also see: *Johnson v. Board of Education of the City of Chicago*, 102 S.Ct. 2223, 2224 (1982); *Quern v. Jordan*, 440 U.S. 332, 347, n.18 (1979).

Lummus Company v. Commonwealth Oil Refinery Company, 297 F.2d 80, 89-90 (2nd Cir. 1961), cert. den. 368 U.S. 986, held that when considering a decision not avowedly tentative, "finality"

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4. A principal reason for the decision in *Liepelt* was that one of the purposes of FELA was to "create uniformity throughout the Union." 444 U.S. 493, n.5.

5. 28 U.S.C. Sec. 2106 authorizes the Court to remand a cause and require "such further proceedings to be had *as may be just under the circumstances.*" (emphasis ours)

> "May mean little more than that the litigation of a particular issue has reached a stage that a court sees no really good reason for permitting it to be litigated again."

While not technically "issue preclusion," it is submitted that the reasoned opinion of the Texas Court of Appeals suffices to bring this case, after six years of litigation in six courts, to the stage that there is no good reason to once again relitigate whether *Liepelt* is applicable to the case at bar. *Finis Rei Atendendus Est.* 3 Coke Inst. 5.

II.

AS *LIEPELT*, A FELA WRONGFUL DEATH CASE, IS NOT "APPLICABLE" TO THIS OCSLA PERSONAL INJURY CASE, IT DOES NOT DISPLACE LOUISIANA LAW.

1. Louisiana law does not require a nontaxibility instruction in a personal injury case.

This Court remanded this case to the Texas Court of Appeals for a determination of "whether Louisiana law *requires* the [*Liepelt*] instruction." 453 U.S. at 488. (Emphasis ours). The Texas court held "such a jury instruction is not mandatory." 628 S.W.2d at 173.

Gulf gives no reason why that holding is error, and as it is not set forth as "a question presented for review" in its petition, it is not before this Court. S. Ct. Rule 21.1 (a); *Andrews v. Louisville & National Railroad Company*, 406 U.S. 320, 324-325 (1972). We thus start from the undisputed premise that Louisiana law does *not* require a *Liepelt* instruction.

2. The inapplicability of *LIEPELT*.

OCSLA mandates that the laws of the adjacent state (here Louisiana) *apply as surrogate federal law* to the extent they are (1) "applicable" and (2) "not inconsistent" with other federal laws (here federal common law). 43 U.S.C. Sec. 1333(a)(2).

In *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 359 (1969) the Court held that under OCSLA "for federal law to oust adopted state law, federal law must first *apply*." (Emphasis added). In *Chevron Oil Company v. Huson*, 404 U.S. 97, 101 (1971) the Court held that "state law remedies are not 'inconsistent' with *applicable* federal law." (Emphasis added). Ergo: If the federal common law enunciated in *Liepelt* is not *applicable*, it cannot be *inconsistent* with state law remedies adopted as federal law. It is submitted that that is the exact posture of this case.

Following the criteria laid down in *Cort v. Ash*, 422 U.S. 66 (1975), the Fifth Circuit in an exhaustive opinion in *Olsen v. Shell Oil Company*, 561 F.2d 1178 (5th Cir. 1977), cert. den. 444 U.S. 979, reached the conclusion that OCSLA affords a worker injured on the Shelf no remedy or cause of action, but on the contrary, requires him "to look to state law for redress" and that such a controversy "should be controlled by state law." 561 F.2d at 1190. State law, said the court, should govern the controversy "not solely because there are 'gaps' in the Federal Code", but because Congress recognized "that the individual states had a very real interest in the workers on these platforms." 561 F.2d at 1189.

Thus the only *ad damnum* state law with which counsel for a worker injured on a drilling rig off the coast of

Louisiana would be familiar would be Louisiana law. *Huson*, supra, 404 U.S. at 103. As Congress' goal, according to *Huson*, was to provide a "familiar body of law," it would defeat that goal if a plaintiff was obliged to apply, not Louisiana law, but federal common law *that was nonexistent when a case was tried*, as in the case at bar.

There being no OCSLA remedy for personal injuries suffered on the shelf, Gaedecke was relegated to a Louisiana cause of action which embraced the *whole body* of Louisiana law, not parts of it. *Huson*, 404 U.S. at 105, n.8. "The federal borrowing under the Lands Act is *all inclusive*." *Bonner v. Chevron U.S.A.*, 668 F.2d 817, 819 (5th Cir. 1982). (emphasis ours) Congress borrowed Louisiana law as the *only* remedy, there being no other, for personal injury suits in OCSLA cases and Louisiana law does not make a *Liepelt* instruction obligatory.

3. Filling the "gaps."

Gulf says "if there is no 'gap' in the federal law, it is not necessary to 'borrow' state law." Pet. p. 11. But there was and is a "gap".

A "gap" exists in federal law in this case because there is no federal *remedy* for an OCSLA personal injury case. In *Huson*, the Court said the intention of Congress is that this gap be filled with the applicable body of state (Louisiana) law, not by federal courts "creating new federal common law". 404 U.S. at 101, 104-105. This was reiterated in the case at bar: We recognized that "congress made clear provision for filling the 'gaps' in federal law; it did not intend that federal courts fill those 'gaps' themselves by creating new federal common law." 453 U.S. at 487-488.

To grant the petition the Court would be obliged to hold that ex post facto federal common law should fill the "gaps" rather than the whole applicable body of state (Louisiana) law. This would be in the face of *Huson* and what the Court said in the instant case.

4. *LIEPELT* is restricted to FELA cases.

The case at bar is a common law negligence suit for *personal injury; Liepelt* is a statutory FELA *wrongful death action.* The courts have without exception refused to apply *Liepelt* to any case other than one arising under FELA:

(a) *Diversity cases: Estate of Spinosa v. International Harvester Company,* 621 F.2d 1154, 1158-1159 (1st Cir. 1980); *Croce v. Bromley Corp.,* 623 F.2d 1084 (5th Cir. 1980); *Vasina v. Grumman Corp.,* 492 F.Supp. 943, 945 (E.D. N.Y. 1980), aff. 644 F.2d 112, 118 (2nd Cir. 1981); *In Re Air Crash Disaster Near Chicago, Ill., etc.,* 526 F.Supp. 226, 229-230 (D.C. Ill. 1981); *Gerbich v. Evans,* 525 F.Supp. 817, 819 (D.C. Colo. 1981);

(b) *Federal Tort Claims Act cases: Draisma v. United States,* 492 F.Supp. 1317, 1327 (W.D. Mich. 1980).

Croce says that as *Liepelt* arose under FELA and not under a state statute that *"this distinction is crucial"*. 623 F.2d at 1098 (Emphasis ours).

Draisma held that as *Liepelt* was a FELA case in which damages is a federal question, it would not control where damages is a state question (as it is de facto in the case at bar). 492 F.Supp. at 1327.

In Re Air Crash Disaster states that *"Liepelt* dealt with the narrow realm of actions brought under the FELA, and did not purport to address the issues of the propriety of instructions concerning taxation outside the context of the FELA". 526 F.Supp. at 229. The Court further held that this Court's decision *in the case at bar* "indicates that the 'federal common law rule' of *Liepelt* is limted to situations similar to those in which it arose". Ib. at p. 230.

5. Alleged conflicts with this Court and with the Fifth Circuit.

Gulf says "compelling reasons" why its petition should be granted are that the decision of the Texas Court of Appeals "is in direct conflict" with the express language of the statute and the decisions of this Court and of the Fifth Circuit. Pet. pp. 7, 8. The trouble with this is that this point is not set forth as "a question for review" as required by S.Ct. Rule 21.1 and thus not before the Court for review. See subpoint II, 1., supra.

But if it was:

(a) The statutory language, 43 U.S.C. Sec. 1333(a)(2), makes only *applicable* federal law oust adopted state law. As the federal common law rule of *Liepelt* is not *applicable,* it does not oust state law, adopted as federal surrogate law dealing with jury instructions.

(b) To say, as Gulf does, Pet. pp. 9, 10, that the decision of the Texas Court of Appeals is in direct conflict with *Liepelt* is to assume what it seeks to prove. Certainly enough has been said to demonstrate that no such conflict exists. See subpoints II, 2, 3, 4, supra.

(c) *Berry v. Sladco, Inc.,* 495 F.2d 523 (5th Cir. 1974) applied federal statutory law that calculates interest

from the date of judgment, rather than Louisiana statutory law that computes interest from the date of judicial demand. Louisiana statutory law was undeniably inconsistent with federal statutory law. But in that case, there were no *gaps* in federal law to be filled by Louisiana law, unlike the case at bar. See subpoint II, 3, supra.

(d) *Continental Oil Co. v. London Steamship Own. Mut. Ins. Assn. Ltd.*, 417 F.2d 1030 (5th Cir. 1969) simply held that as there was a "fully effective maritime right and remedy," 417 F.2d at 1035, the Louisiana direct action statute was not "applicable" federal law. In the case at bar, the *only* "right and remedy" was provided by Louisiana law. See subpoints II, 2, 3, supra.

III.

ASSUMING ARGUENDO THAT *LIEPELT* APPLIES TO THE INSTANT CASE, FAILURE TO CHARGE THE JURY AS TO THE NONTAXABILITY OF FEDERAL INCOME TAXES WAS HARMLESS ERROR.

The Texas Court of Appeals did not reach the question of harmless error as it held *Liepelt* did not displace state law in an OCSLA case. 628 S.W.2d 175. But in any event, Gulf was not "prejudiced" by failure to give a *Liepelt* jury instruction.

1. Gulf's burden.

28 U.S.C., Sec. 2111 specifically requires that judgment on certiorari shall be given "without regard to errors which do not affect the substantial rights of the parties." A petitioner for certiorari thus has "the burden of show-

ing error in the judgment he asks us to set aside." *Higgins v. Carr Bros. Co.*, 317 U.S. 337, 338 (1943); *Palmer v. Hoffman*, 318 U.S. 109, 116 (1943). "Error is not presumed but must be affirmatively shown." 7 *Moore's Federal Practice*, Sec. 61.11, n.13 (2nd Ed. 1982).

Each case stands on its own proceeding "in its entirety." *Kotteakos v. United States*, 328 U.S. 750, 762 (1946). And the harmless error rule embraces jury instructions. See *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 629 (1959).

2. *Flanigan* and *Vanskike*.

In *Flanigan v. Burlington Northern, Inc.*, 632 F.2d 880 (8th Cir. 1980), cert. den. 450 U.S. 921, a FELA personal injury case, the Court:

(a) Held there is no hypothesis that a failure to give a nontaxability instruction causes juries to increase awards; but on the contrary there is empirical data that juries in general do not increase recoveries in the belief that they are subject to income tax, citing Kalven, *A Report on the Jury Project*, Conference on the Aims and Methods of Legal Research, University of Michigan Law School, 167-168 (1957), (632 F.2d at 890);

(b) Said that the *Liepelt* award was not supported by even the plaintiff's evidence; was a wrongful death case where plaintiff's proof concentrated on his loss of pecuniary earnings and contribution to his dependents; whereas *in the personal injury case before it* plaintiff was not only entitled to loss of future income but also *compensation for substantial pain and suffering* (Ib.);

(c) Noted particularly that the railroad was not prevented (nor was Gulf in the case at bar) from offering evidence of net earnings as was the railroad in *Liepelt*, and had failed to point out any evidence that the jury inflated its award on the erroneous belief that the award would be taxable, but on the contrary,

> [T]he evidence fully supports the jury's verdict and indicates the jury was not operating under any misconceived notions of the tax laws. (Ib.).

Therefore, without evidence of an excessive verdict, as in *Liepelt*, the Court found no reversible error. Accord: *Ingle v. Illinois Cent. Gulf R. Co.*, 608 S.W.2d 76, 83 (Mo. App. 1980).

The eighth circuit followed *Flanigan* in *Vanskike v. ACF Industries*, 665 F.2d 188 (8th Cir. 1981), a FELA case, saying (1) "The question is whether the defendant can show that the jury was operating under a false impression of the tax law," 678 F.2d at 207, and (2) "A great disparity between the evidence and the verdict would be one indication that the jury did operate under such a false impression" Ib.

As there was testimony in *Vanskike* that plaintiff's past lost wages were $108,654.00 and future wages were $583,291.00 and he was entitled to be compensated for medical expenses and for pain and suffering, the court held there was not "such a great disparity between the evidence and the award as to indicate that the jury increased the award because of a mistaken belief that the verdict would be subject to income taxes" (Ib.).

3. *LIEPELT* is actually an excessive verdict case.

"Opinions must be read in the setting of the particular cases and the product of preoccupation with the special facts". *Freeman v. Hewitt*, 329 U.S. 249 (1946).

Ingle, supra, 608 S.W.2d at 63, says the purpose of *Liepelt* was to prevent the rendering of an excessive verdict. The Court itself actually refers to preventing "overcompensation to plaintiff." *Liepelt*, 444 U.S. at 498.

In *Liepelt*, this Court of necessity restricted itself to the facts before it and decided that the jury's verdict was, *under the evidence*, excessive. *Liepelt's* expert produced a damage total reduced to present value of $302,000. 444 U.S. at 492. The railroad unsuccessfully offered to prove by its own expert that the net pecuniary loss was $138,327. The jury returned a verdict of $775,000! This made the award over *two and one-half times* the amount supported by the evidence. On these facts the case becomes no more than ordinary case of an excessive verdict without evidentiary support.

4. Gulf does not claim the verdict is excessive; in fact it was fully supported by the evidence.

Gulf did not pursue in the appellate courts its trial court claim that the damage award was without support of the evidence (Tr. 311; Gulf's points of error in the Texas Court of Civil Appeals, Brief for Appellant, p. 413). Gulf's excessive damage claim was therefore, abandoned, *Bickler v. Bickler*, 403 S.W.2d 354, 361 (Tex. 1966), and any error rendered harmless. *Schybinger v. Interlake Steamship Company*, 273 F.2d 308, 314 (7th Cir. 1959).

This noncontroversial defense as to damages brings the instant case within the parameters of *Grunenthal v. Long Island Railroad Company*, 393 U.S. 156 (1968). *Grunenthal* was a FELA case in which the jury awarded plaintiff $305,000. The Court of Appeals entered a remittitur damna for $105,000. This Court reversed because after a detailed appraisal of the damage evidence it found the trial judge's estimate of the value of the factors which the jury considered supported by the evidence. After balancing those factors (wages before trial, future wages and pain and suffering), the Court found the *aggregate* award proper. It approved the trial judge's finding: "nothing untoward, inordinate, unreasonable or outrageous, nothing indicative of a runaway jury or one that lost its head." 393 U.S. at 160.

It is submitted that the aggregate of all the damage factors in the case at bar show that the *total amount* of the verdict is fully supported by the evidence.[6] As in *Grunenthal*, the *damages in this case, in contrast to LIEPELT, are noncontroversial and Gulf does not contest them.*

In sum, any error in failing to give a *Liepelt* instruction was cured by the verdict. 11 Wright and Miller, *Federal Practice and Procedure*, Sec. 2886, pp. 290, 291, n.71 (1973); 5A C.J.S. Sec. 1776(b); *Smith v. Brady*, 390 F.2d 176, 177-178 (4th Cir. 1968).

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6. The total award to Gaedecke is $900,000.00 Future lost earnings alone were $1,300,000.00 *without considering physical pain, mental anguish or physical impairment*. Gaedecke was hospitalized sixty days on five different occasions, had three major operations and his injuries and pain are permanent and continuing. See our brief in the previous submission of the case, No. 80-590, at the October, 1980 term, p. 33 and Appendix D thereto. *Gulf does not contest these facts.*

CONCLUSION

There being no ground for review of the decision below, the petition for writ of certiorari should be denied.

Respectfully submitted,

/s/

JOSEPH D. JAMAIL
3300 One Allen Center
Houston, Texas 77002
(713) 651-3000

Counsel of Record for Respondent Steven Gaedecke

Of Counsel:

JAMAIL, KOLIUS & MITHOFF
GUS KOLIUS
JOHN B. NEIBEL
NAT B. KING
3300 One Allen Center
Houston, Texas 77002
(713) 651-3000

CERTIFICATE OF SERVICE

I, Joseph D. Jamail, a member of the bar of this Court and counsel for Steven Gaedecke, hereby certify that:

(1) All parties required to be served in this proceeding have been served;

(2) Three copies of the foregoing Brief in Opposition of Respondent Steven Gaedecke were served on counsel of record for each of the other parties separately represented in this proceeding at their respective post office addresses, viz.,

Bradley A. Jackson, Esq.
Royston, Rayzor, Vickery & Williams
2200 Texas Commerce Tower
Houston, Texas 77002;

Frank Caton, Esq.
Crain, Caton, James & Womble
Two Houston Center
Houston, Texas 77002;

(3) Service on each of such parties was made on the 14th day of September, 1982, by depositing said copies of this Brief in Opposition of Respondent Steven Gaedecke in a United States Post Office, first class postage prepaid, and addressed to the above named counsel.

/s/
JOSEPH D. JAMAIL